STATE OF MICHIGAN

COURT OF APPEALS

FRANK R. HAYGOOD,

Plaintiff-Appellant,

v

THE SALVATION ARMY,

Defendant-Appellee,

and

TOM TUPPENNEY,

Defendant.

UNPUBLISHED
October 11, 2005

No. 253881
Wayne Circuit Court
LC No. 02-235265-CK

Before: Fort Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant, The Salvation Army ("defendant"). We affirm.

Defendant discharged plaintiff from its employ. Plaintiff claimed defendant discharged him on account of sex. On appeal, plaintiff argues that the trial court erred in finding no genuine issues of material fact with respect to direct evidence of unlawful discrimination or circumstantial evidence of discrimination. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition based on this rule, a court must

consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

The Civil Rights Act, MCL 37.2101 *et seq*., prohibits discrimination on the basis of sex. MCL 37.2202(1)(a); *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). An employer cannot make an adverse employment decision on the basis of the employee's sex. MCL 37.2202(1)(a). A plaintiff may prove discrimination by direct or circumstantial evidence. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001). Where a plaintiff has direct evidence of bias, he can go forward and prove unlawful discrimination in the same manner as a plaintiff in any other civil case. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Where there is direct evidence of unlawful discrimination, the shifting burden of proofs required in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), do not apply. *DeBrow*, *supra* at 539. Direct evidence means evidence, which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 132-133; 666 NW2d 186 (2003). A single remark from a supervisor in the context of a discussion regarding a plaintiff's termination, even if the statement might be subject to multiple interpretations, is sufficient to constitute direct evidence, and the remark's weight and believability are strictly matters for the finder of fact. *DeBrow*, *supra* at 538-541. But where the remark in question is not made by a person involved in the termination of a plaintiff's employment, it is irrelevant and cannot be attributed to the employer. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 301-302; 624 NW2d 212 (2001).

Plaintiff relies on one remark as direct evidence of bias. Plaintiff alleged that when he was advised of his discharge, he inquired why a female managerial employee was not terminated for dating a direct subordinate. Plaintiff alleged that Major Thomas Tuppenney responded, "You're a man." But the remark remains a single piece of evidence, to be viewed in context. The trial court essentially reasoned that the evidence of defendant's proffered reason for termination, gross misconduct, was so strong that the single remark by Tuppenney could not "top" it. In other words, the evidence supporting the basis for terminating plaintiff for his misconduct, a ten-year[1] extra-marital affair with a subordinate by a supervisor who oversees personnel policy, was so substantial that no genuine issue of material fact was raised by Tuppenney's alleged remark. We agree. Where there is direct evidence of bias, the plaintiff may proceed as in any other civil case, *Hazle*, *supra*, but in any civil case, the plaintiff must generate a genuine issue of material fact when faced with a motion for summary disposition. MCR 2.116. Defendant is a religious organization. Defendant relied on its director of human resources to oversee its policies and not to infringe upon them. Plaintiff's situation was different from other personnel based on his status as the human resources director.[2] The trial court's

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[1] The record varies on this point. Plaintiff's affidavit states that the affair was for an eight-year period. This disparity is irrelevant to our analysis.

[2] Moreover, plaintiff's affidavit did not contradict the affidavit of Salvation Army Major Gregory Allan. Allan, when presented with rumors that plaintiff was involved with a subordinate
(continued…)

conclusion, that the remark did not "top" the strong evidence in favor of the stated basis for the discharge, is sound.

Moreover, plaintiff failed to establish that the stray remark by Tuppeney was made by the ultimate decision maker. See *Krohn, supra*. Tuppenney testified that he was involved in the decision to terminate to the extent that he made the *recommendation*. But the affidavit of Divisional Commander, Major Norman Marshall, confirms that Tuppenney did not have authority to terminate an employee's employment. Marshall's affidavit states that "[t]he Divisional Finance Board made the decision, based upon the investigation and Mr. Haygood's admitted misconduct, that Mr. Haygood's employment be terminated." Although plaintiff presents evidence that Tuppenney was involved in the decision, Marshall's affidavit shows that "[a]ll termination decisions are made solely by The Divisional Finance Board," and plaintiff lacks evidence to contest that the actual decision, as opposed to a recommendation, was by Tuppenney. Plaintiff presented no evidence that the Divisional Finance Board in any way approved or shared the "You're a man" comment by Tuppenney. Therefore, the single alleged remark by Tuppenney cannot be attributed to defendant's decision-making body as the basis for the termination, and the direct evidence of bias fails to raise a genuine issue of material fact. *Harrison v Olde Financial*, 225 Mich App 601, 608-609 n 7, 610; 572 NW2d 679 (1997).

Where circumstantial proof is used to prove bias, the prima facie case has four elements:

> Absent direct evidence of discrimination, a plaintiff may establish a prima facie case of employment discrimination by showing (1) that the plaintiff was a member of a protected class, (2) that an adverse employment action was taken against the plaintiff, (3) that the plaintiff was qualified for the position, and (4) that the plaintiff was replaced by one who was not a member of the protected class. [*Smith v Goodwill Industries*, 243 Mich App 438, 447; 622 NW2d 337 (2000) (internal block quote and citation omitted).][3]

The plaintiff must prove that similarly situated employees were treated differently. *Smith, supra*, see also *Bachman v Swan Harbour Associates*, 252 Mich App 400, 433; 653 NW2d 415 (2002). "The essence of a sex discrimination civil rights suit is that similarly situated persons have received disparate treatment because of their sex." *Diamond v Witherspoon*, 265 Mich App 673, 683; 696 NW2d 770 (2005). To show that an employee was similarly situated, the plaintiff must prove that all of the relevant aspects of her employment situation were nearly identical to those of another employee's employment situation. *Smith, supra*. Similarly situated typically means of the same rank and employment history.

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employee, advised him that the employer could not afford for him to be involved with an employee in light of his position as human resources manager. Plaintiff reportedly responded that he would take care of the issue, and it would not be a problem. Yet, plaintiff continued to have relationships with subordinate members of the staff.

[3] There is no additional evidentiary burden for a reverse discrimination case. See *Lind v Battle Creek*, 470 Mich 230; 681 NW2d 334 (2004).

Here, the question becomes whether any similarly situated female employee dated a subordinate and was not discharged. Plaintiff contends that a female in a managerial role also had an affair with a subordinate and was not discharged. Defendant disputes that this female dated a subordinate. The trial court did not err in holding that this female was not similarly situated. She earned $20,000 less than plaintiff and was not the director of human resources, in charge of overseeing defendant's personnel policies, like plaintiff was. Moreover, this female did not engage in an extra-marital affair. Defendant, as a religious organization, did not approve of extra-marital conduct. Thus, there was insufficient evidence to generate a genuine issue of material fact on the claim that a female was similarly situated to plaintiff. The trial court correctly held that plaintiff failed to establish a prima facie case because the circumstantial evidence of discrimination did not satisfy the elements where plaintiff failed to establish that similarly situated women were treated differently.

Even assuming plaintiff established a prima facie case, defendant offered a legitimate, non-discriminatory reason for the discharge. Defendant's reason was plaintiff's admitted misconduct and that his misconduct caused discord among employees, specifically, the verbal altercation between his former paramour and his then current paramour. Plaintiff failed to rebut this reason because plaintiff lacked evidence that it was pretextual. Defendant is a religious organization. Its human resources director oversees employment policies and orients new employees to them, and it became clear that plaintiff had admitted to relationships that flaunted a policy against superiors dating subordinates. There is a lack of evidence that defendant's stated reason was a pretext for discrimination.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Peter D. O'Connell